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No. 83-

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

OFFICENTERS INTERNATIONAL CORP. OF ATLANTA,

Petitioner,

versus

INTERSTATE NORTH ASSOCIATES,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

PETITION

WINFORD KENT BISHOP
Counsel for Petitioner
1835 First Atlanta Tower
Two Peachtree St., N.W.
Atlanta, Georgia 30383
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I.

QUESTIONS PRESENTED FOR REVIEW

1. Fourteenth Amendment Due Process of Law

Whether an indigent tenant --

determined at rent due hearing to owe no past due rent nor any future rent but (erroneously) to owe leasehold construction costs of $340,370.17 (fourteen times the monthly rent not due), to be paid in cash into court in three (3) days for tenant to retain possession of leasehold pending jury trial, without judicial intimation that landlord would possibly prevail at trial, which tenant could not pay because of landlord's failure to construct premises so that tenant could procure rental income from subtenants

for private office services (landlord was found not to have sustained burden of proof on substantial completion); could not prevent writ of immediate possession from being issued or executed because of known indigency; and thereafter during discovery period on counterclaims judicially allowed as amendments to answer after execution of writ, was blindsided by totally unanticipated order that the writ was a final judgment (contrary to Johnson v. Gwinnett County Bank, 156 Ga. App. 597, 275 S.E.2d 157 [1980]), that the dispossessory proceeding had been terminated more than thirty (30) days before, and past the statutory appeal period, all with the result of leaving tenant out of possession without right to appeal from issuance or execution of writ of immediate possession --

Has been deprived of Fourteenth Amendment Due Process of Law in the following respects:

(a) The order to pay $340,370.17 in cash in three (3) days into court for leasehold construction costs (alleged rent due) was --

(i) a reincarnation of

(A) State v. Sanks, 225 Ga. 88, 166 S.E.2d 19 (1969), as to which probable jurisdiction was noted in Sanks v. Georgia, 395 U.S. 974, 23 L.E.2d 763, 89 S.Ct. 2150 (1969), reset for oral argument, 399 U.S. 922, 26 L.E.2d 788, 90 S.Ct. 2229 (1970), but then dismissed (after the Georgia General Assembly incidentally repealed

pre-1970 dispossessory statute and enacted present one [eff. July 1, 1971], at issue herein), 401 U.S. 144, 27 L.E.2d 741, 91 S.Ct. 593 (1971); and

(B) Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966), as to which certiorari to the Georgia Supreme Court was denied over objection of three justices, with Justice Douglas filing dissenting opinion in which the Chief Justice concurred, Williams v. Shaffer, 385 U.S. 1037, 17 L.E.2d 683, 87 S.Ct. 772 (1967); and

(ii) a perversion of general notions of landlord-tenant law examined

in Lindsey v. Normet, 405 U.S. 56, 31 L.E.2d 36, 92 S.Ct. 862 (1972), and

(iii) fundamentally unfair to an indigent tenant without an opportunity to prove bona fide efforts to raise a quattuordecim cash bond of $340,370.17, by analogy to Bearden v. Georgia, -U.S.-, 76 L.E.2d 221, 103 S.Ct. 2064 (May 24, 1983); and

(iv) an impermissible bar to an indigent tenant's defending itself with defenses judicially determined in the trial court to be meritorious as permitted by Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841

(1897); cf., Boddie v. Connecticut, 401 U.S. 371, 28 L.E.2d 113, 91 S.Ct. 780 (1971); and

(v) contrary to the judicial decisions of District of Columbia, California, Florida, and West Virginia, and similar to Minnesota's. See pp. 50, 51, infra.

(b) The putative, statutory jury trial on the merits was an inadequate and meaningless opportunity to be heard on the merits prior to purported de jure permanent deprivation of property; compare by analogy North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601 at 607-608, 42 L.E.2d 751 at 757-758, 95 S.Ct. 719 (1975); and

(c) The trial court's order of February 11, 1982, which rendered the writ of

possession a final order and cut off tenant's right to appeal, transforming a temporary deprivation of property into a permanant deprivation, was --

(i) fundamentally unfair since the trial judge himself entered a "Rule Nisi Order" within the 30-day appeal period ("that all pending Motions in the above-styled proceeding, including Defendant's Motion . . . previously scheduled by the Clerk's office to be heard at 9:00 a.m. on Wednesday, March 10, 1982, and Plaintiff's Motion . . . are set down to be heard at 1:30 p.m. on February 5, 1982. . . ."); and

(ii) unexpected and surprising under Georgia law, Johnson v.

Gwinnett County Bank, 156 Ga. App. 597, 275 S.E.2d 157 (1980);

Especially in light of trial judge's six-day earlier finding of fact and conclusion of law: "I think the classic provisions of the due process clause have been complied with."; considering that

(d) Due Process questions were raised at first opportunity under the circumstances:

(i) the court had threatened civil and criminal contempt if a director of tenant attempted to assert any claim to the leasehold premises; and

(ii) the trial court had twice previously denied rehearings on ruling even to the point of cautioning tenant's counsel not to "quibble" with the court; and

(iii) the term at which the writ of possession had issued had changed, and the court had lost all jurisdiction to vacate the order; and

(e) Due Process questions were reviewed by both Georgia appellate courts:

(i) The Georgia Supreme Court now exercises discretion whether to consider a constitutional issue raised even for the first time on appeal, Brown v. Housing

Authority of Atlanta, 240 Ga. 647 at 653, 242 S.E.2d 143 (1978); and

(ii) In transferring the appeal to the Georgia Court of Appeals, the Supreme Court necessarily determined either that the issue of the facial constitutionality of Ga. Code Ann. §61-304(c) was insubstantial, which would not bar certiorari, cf. Brinkerhoff-Faris, Trust Co. v. Hill, 281 U.S. 673, 74 L.E.2d 1107, 50 S.Ct. 451 (1930), with Palmer v. City of Euclid, 402 U.S. 544, 29 L.E.2d 98, 91 S.Ct. 1563 (1971); or the Supreme Court determined that the Court of Appeals could pass on the constitutionality of the

application of said statute, cf. Western Union Telegraph Co. v. King, 188 Ga. 95, 2 S.E.2d 909 (1939) with Western Union Telegraph Co. v. King, 61 Ga. App. 537, 6 S.E.2d 368 (1939); and the Court of Appeals implicitly found statute was constitutional; and

(iii) The Georgia Court of Appeals' cryptic quotation of case mentioning mootness was not an independent state ground because (A) it was incidental (being the last sentence in a three-page majority opinion, not a point of disagreement between majority and dissenting opinions), (B) summary judgment had earlier foreclosed all issues in the cited case; and

(C) a state court determination on mootness is not controlling on this Court since it is a federal question, Ward v. Love County, 253 U.S. 17, 22, 64 L.Ed. 751, 758, 40 S.Ct. 419 (1920), cited in Williams v. Shaffer, 385 U.S. 1037, 17 L.E.2d 683, 684, 87 S.Ct. 722 (1967), cf. Sanks v. Georgia, 401 U.S. 144, 27 L.E.2d 741 91 S.Ct. 593 (1971); and

Therefore, this case is subject to certiorari under Brinkerhoff-Faris Trust & Saving Co. v. Hill, 281 U.S. 673, 74 L.E.2d 1107, 50 S.Ct. 451 (1930).

2. Fourteenth Amendment Equal Protection of the Laws

Whether said indigent tenant, one of more than sixty-seven million Americans who reside in apartments or other rented housing (of which a member of this Court has taken judicial notice, Lindsey v. Normet, 405 U.S. 56, 81, 31 L.E.2d 36, 55 92 S.Ct. 862 [1972] [Douglas, J., dissenting in part], see p. 65, infra) --

upon the facts and particularly poverty, and the law and argument cited at pp. 52-55, infra --

Has been deprived of Fourteenth Amendment Equal Protection of the Law.

II.

CORPORATE INFORMATION AND AFFILIATIONS

A. Landlord

Respondent ("landlord") "Interstate North is jointly owned by David Rockefeller and Kent Rose and Nora Rose" (T-12/18/81 5). Petitioner's ("tenant's") indigency bars an examination into the corporate relationships among landlord and the interests of David Rockefeller, former chairman, chief executive officer, Chase Manhattan Bank, N.A., Rockefeller Center, Inc., Rockefeller University, Rockefeller Foundation, Rockefeller Bros. Fund, Rockefeller Family Fund, Eastern Atlantic Corporation, Atlanta Investing, Inc. and Exxon Inc. (formerly, Standard Oil Company of New Jersey).

B. Tenant

Petitioner "filed a Certificate of Incorporation under the corporate laws

of the State of Delaware on January 20, 1981. [Paragraph indentation omitted.] However, . . . this company is no longer in existence as a Delaware corporation since its charter became void and inoperative on March 1, 1983, due to non-payment of franchise taxes. It was proclaimed by the Governor on June 27, 1983." Letter to counsel of record from State of Delaware, Department of State, Division of Corporations, Marie C. Shultie, Corporations Administrator, dated August 5, 1983.

As suggested in Part I, this petition derives from a dispossessory proceeding initiated on November 23, 1981 by landlord against tenant, a leasehold corporation, which defended itself in the State Court of Cobb County, Georgia, suffered adverse judicial orders, appealed on March 15,

1982, to the Supreme Court of Georgia which by order of September 7, 1982 transferred the case to the Court of Appeals of Georgia, which entered decision on March 11, 1983, from which tenant sought a discretionary writ of certiorari in the Supreme Court of Georgia denied June 7, 1983.

Counsel of record first learned of forfeiture of charter on June 30, 1983. Said Counsel has been advised that tenant's cause of action to regain an interest in the dispossessed leasehold is held by the dissolved corporation. New York counsel for tenant advises that right, title and interest in and to a dissolved corporation's property are unimpaired by dissolution, Addy v. Short, 47 Del. 157, 89 A.2d 136 (Sup. Ct. 1952), and that dissolution of a corporation has no bearing in any

contest involving any party, other than directly between the State of Delaware and the dissolved corporation, Frederic G. Krapf & Son v. Gorson, 243 A.2d 713 (Del. Sup. Ct. 1968).

Throughout the time this case was pending in the State Court of Cobb County, tenant's capital stock was owned by Officenters International Corp. ("parent"), a Delaware corporation. Thereafter, according to New York Counsel, capital stock of tenant was transferred to and is now owned by a private individual, a citizen of the State of New Jersey.

Counsel of record was first advised of said transfer on August 29, 1983.

Officenters International, Inc. "filed a Certificate of Incorporation

under the corporate laws of the State of Delaware on May 13, 1983. [Paragraph indentation omitted.] According to the records in this department, this company is duly incorporated under the laws of the State of Delaware, is in good standing, has a legal corporate existence and is duly authorized to transact business." Letter to counsel of record from State of Delaware, Department of State, Division of Corporations, Marie C. Shultie, Corporations Administrator, dated August 5, 1983.

Counsel of record first learned of the organization of the affiliated company on June 30, 1983.

III.

TABLE OF CONTENTS

		Page
I.	Questions Presented for Review	
	A. Fourteenth Amendment Due Process of Law	i
	B. Fourteenth Amendment Equal Protection of the Laws	xiii
II.	Corporate Information and Affiliations	
	A. Landlord	xiv
	B. Tenant	xiv
III.	Table of Contents	
	A. Petition	xix
	B. Appendix	xxi
IV.	Table of Authorities	xxv
V.	Reference to Reports of Opinions Delivered by Courts Below	1
VI.	Grounds on Which the Jurisdiction of this Court is Invoked	1
VII.	Constitutional Provisions, Statutes Which the Case Involves	3
VIII.	Statement of the Case	
	A. The Transaction	5
	B. Rent Due Hearing	7
	C. Assignment of Lease to Parent and Notification to Court and Landlord . .	13

VIII. Statement of the Case (Continued)
D. Writ of Possession 15
E. Execution of Writ of Possession and Motion Stage 16
F. Unforeseeable Order Pretermitting Jury Trial or Further Proceedings . . 19
G. Appeal to Georgia Supreme Court 20
H. Transfer to Court of Appeals and Decision . . . 21
I. Petition for Writ of Certiorari to Georgia Supreme Court and Denial 23

IX. State Court Deprived Tenant of Due Process of Law 25
A. Georgia's Current Dispossessory Statute . . 25
B. Georgia's Pre-1970 Dispossessory Statute . . 37
C. Oregon's Forcible Entry and Wrongful Detainer (FED) Statute Reviewed in Lindsey v. Normet, 405 U.S. 56, 31 L.E.2d 36, 92 S.Ct. 862 (1972). . 39
D. Judicial Interpretation of Georgia's Current Dispossessory Statute Has Reverted to Pre-1970 Construction 41
E. Decision Below 46
F. Deprivation of Fourteenth Due Process of Law 47

X. State Court Deprived Tenant of Equal Protection of Law
A. Two Classes of Tenants: One Rich, One Poor; One Can Defend; One Can't 52
B. Cases 54

XI. Georgia Supreme Court Passed on Constitutional Law Issues Raised: Herein of Evolving, Discretionary, Constitutional Jurisdiction of Georgia Surpeme Court
A. Self-Imposed Historic Restriction on Jurisdiction 57
B. Emerging Doctrine of Discretion Where Substantial Constitutional Issue Involved. . . 62

XII. Conclusion

TABLE OF CONTENTS
OF APPENDIX

Page

I. Copy of Opinions, Orders Delivered by the Georgia Court of Appeals whose Decision is Sought to be Reviewed

A. Majority Opinion of Five Judges, dated March 11, 1983 . . . . . A-1

B. Dissenting Opinion of Four Judges, dated March 11, 1983 . . . . . A-6

C. Order Denying Motion for Rehearing dated March 30, 1983 . . . . . A-10

II. Copy of Opinions, Orders, Findings of Fact, and Conclusions of Law, Written and Oral (Recorded and Transcribed), Delivered by the State Court of Cobb County whose Decisions were Reviewed by Georgia Supreme Court and Georgia Court of Appeals

A. Findings of Fact, Conclusions of Law, Delivered Orally (Recorded and Transcribed), dated December 18, 1981. . . . . A-12

B. Findings of Fact, Conclusions of Law, dated December 21, 1981. . . . . A-18

C. Order, dated December 21, 1981. . . . . A-24

D. Findings of Fact, Conclusions of Law, Delivered Orally (Recorded and Transcribed), dated December 31, 1981. . . . . A-27

E. Writ of Possession, dated December 31, 1981. . . . . A-31

F. Rule Nisi Order dated January 28, 1982 . . . . . A-34

G. Findings of Fact, Conclusions of Law, Delivered Orally (Recorded and Transcribed), dated February 5, 1982 . . . . . A-36

H. Order, dated February 11, 1982 . . . . . A-43

III. Copies of any Other Such Opinions Orders, Rendered by Supreme Court of Georgia

A. Order transferring case to Georgia Court of Appeals, dated September 7, 1982. . . . . A-51

B. Order denying Writ of Certiorari to Court of Appeals, dated June 7, 1983 . . . . . A-53

IV. Fourteenth Amendment, Section 1, United States Constitution A-54

V. Georgia Code Annotated §61-301, et seq.

§ 61-301. . . . . A-55
61-302. . . . . A-56
61-303. . . . . A-58
61-304. . . . . A-60
61-304(c) A-62
61-305. . . . . A-63
61-306. . . . . A-64
61-307. . . . . A-65
61-308. . . . . A-65
61-309. . . . . A-66

VI. Lease Agreement. A-67

IV.

TABLE OF AUTHORITIES

Cases

Addy v. Short, 47 Del. 157, 89 A.2d 136 (Sup. Ct. 1952) xvi

Alexander v. State, 239 Ga. 810, 239 S.E.2d 18 (1977) 57

American Railway Express Co. v. Levee, 263 U.S. 19, 68 L.Ed. 140, 44 S.Ct. 11 (1923) 3

Barnes v. State, 244 Ga. 302, 260 S.E.2d 40 (1979) 59, 61, 62

Bearden v. Georgia, -U.S.-, 76 L.E.2d 221, 103 S.Ct. 2064 (1983) . . .v, 48, 55

Bell v. Burson, 402 U.S. 535, 29 L.E.2d 90, 91 S.Ct. 1586 (1971) 49

Bell v. Tsintolas Realty Co., 139 U.S. App. D.C. 101, 430 F.2d 474 (D.C. Cir. 1970) 50

Boddie v. Connecticut, 401 U.S. 371, 28 L.E.2d 113, 91 S.Ct. 780 (1971) . . . . . vi, 48, 54

Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451 (1930) . . . . . x, xii, 60

Brown v. Housing Authority of Atlanta, 240 Ga. 647, 242 S.E.2d 143 (1978) . . . . . ix, 61, 63

Burns v. Ohio, 360 U.S. 252, 3 L.E.2d 1209, 79 S.Ct. 1164 (1959) 55

Cochran v. Kansas, 316 U.S. 255, 86 L. Ed. 1453, 62 S.Ct. 1068 (1942) . . . 55

Cohen v. Beneficial Loan Corp., 337 U.S. 541, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949). 55

Cohen v. Hardman, 416 So.2d 498 (5th Dis. Ct. App. Fla. 1982) 50

Cooper v. State, 226 Ga. 722, 177 S.E.2d (1970). 56

Dowd v. United States, 340 U.S. 206, 95 L.Ed. 215, 71 S.Ct. 262 (1951). . 55

Ferguson v. Georgia, 365 U.S. 570, 5 L.E.2d 783, 81 S.Ct. 756 (1961). . 58

Frederic G. Krapf & Son v. Gorson, 243 A.2d 713 (Del. Sup. Ct. 1968). . xvii

Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973). 51

Fuentes v. Shevin, 407 U.S. 67, 32 L.E.2d 556, 92 S.Ct. 1983 (1972) . . 50

Gainey v. State, 232 Ga. 334, 206 S.E.2d 474 (1974) 57

Grantham v. Nelson, 160 Ga. App. 68, 286 S.E.2d 59 (1981) 44

Grantham v. State, 244 Ga. 775, 262 S.E.2d 777 (1977). 61

Green v.Superior Court, 10 Cal.3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974 en banc). 50

Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956) . . . 55

Herndon v. Georgia, 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794 (1935). . 58, 60

Hicks v. Beachan, 131 Ga. 89, 62 S.E. 45 (1908) 37

Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897) . . v, 48

Hurtado v. California, 110 U.S. 516, 28 L.Ed. 232 (1884) 48

In re Sliz, 246 Ga. 797, 273 S.E.2d 177 (1980) 61, 63

Javins v. First National Realty Corp. 138 U.S.App.D.C. 369, 428 F.2d 1071 (D.C. Cir. 1970), cert. denied 400 U.S. 925, 27 L.E.2d 185, 91 S.Ct. 186 (1970) 50

Jelks v. World of Realty, Inc., 153 Ga. App. 720, 266 S.E.2d 357 (1980). . . 45

Johnson v. Gwinnett County Bank, 156 Ga. App. 597, 275 S.E.2d 157 (1980) . . . . . ii, vii, 29, 44

King v. Moorhead, 495 S.W.2d 65 (Mo. Ct.App. 1973). 51

Krasner v. Rutledge, 204 Ga. 380, 49 S.E.2d 864 (1948). 56

Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980). 45, 46

Lindsey v. Normet, 405 U.S. 56, 31 L.E.2d 36, 92 S.Ct. 862 (1972) . . . . . v, 39-41, 48, 54, 65

Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813, 256 S.E.2d 785 (1979) 43

Mitchell v. W. T. Grant Co., 416 U.S. 600, 40 L.E.2d 406, 94 S.Ct. 1895 (1974) 49

Mountain Hardwood & Pine, Inc. v. Coosa River Sawmill Co., 233 Ga. 414, 211 S.E.2d 712 (1975). 42, 45

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 42 L.E.2d 751, 95 S.Ct. 719 (1975) . . . . . vi, 49

Officenters International Corp. of Atlanta v. Interstate North Associates, 166 Ga. App. 93, 303 S.E.2d 292 (1983) . . . . . .passim

Palmer v. City of Euclid, 402 U.S. 544, 29 L.E.2d 98, 91 S.Ct. 1563 (1971) x

Reece v. Georgia, 350 Ga. 85, 100 L.Ed. 77, 76 S.Ct. 167 (1956). . . . 58

Richmond Concrete Products Co. v. Ward, 212 Ga. 773, 95 S.E.2d 677 (1956) 57

Sanks v. Georgia, 401 U.S. 144, 27 L.E.2d 741, 91 S.Ct. 593 (1971) . . . . . iii, xii, 37

Smith v. Bennett, 365 U.S. 708, 6 L.E.2d 39, 81 S.Ct. 895 (1961) . . . 54

Sniadach v. Family Finance Corp. 395 U.S. 337, 23 L.E.2d 349, 89 S.Ct. 1820 (1969) 49

State v. Sanks, 225 Ga. 88, 166 S.E.2d 19 (1969) iii

Stembridge v. State, 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834 (1952) . . 58

Teller v. McCoy, 253 S.E.2d 114 (W.Va. 1979) 51

Wadley Southern Railway Co. v. Faglee, 173 Ga. 814, 161 S.E. 847 (1931) . . . . . v, vi, 59

Ward v. Love, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419 (1970) xii

Western Union Telegraph Co. v. King, 61 Ga. App. 537, 6 S.E.2d 368 (1939) . . . . . xi, 23

Western Union Telegraph Co. v. King, 188 Ga. 95, 2 S.E.2d 909 (1939). . . . . xi, 23

Widemon v. Burson, 224 Ga. 665, 164 S.E.2d (1968). 56

Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427 (1982). 62

Williams v. Georgia, 349 U.S. 375, 99 L.Ed. 1161, 75 S.Ct. 814 (1955) 58

Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668 (1966). iv

Williams v. Shaffer, 385 U.S. 1037, 17 L.E.2d 683, 87 S.Ct. 772 (1967). . . . . iv, xii, 42

Windsor v. McVeigh, 93 U.S. 274, 277, 23 L.Ed. 914, 915 (1876). . . . 48

Statutes

1 Ga. Laws 1970 at pp. 968-972,
Ga. Code Ann. §§ 61-301 et seq. . passim

Ga. Code Ann. §§ 24-3603. 2
24-3648. 1
24-4531. 2

28 U.S.C. §1257(3). 3, 59
§ 2403(b) . . . . . .C-ii

Constitutions

United States, Amendment XIV,
Section 1. . . . . ..passim

Georgia, 1976, Article VI,
Section II, Paragraph IV,
Ga. Code Ann. § 2-3104 60

Other

Restatement (Second) of Property
§ 10.3 (1970). 51

World Almanac (Newspaper
Enterprise Association, 1983). 65

V.

REFERENCE TO REPORTS OF OPINIONS DELIVERED BY COURTS BELOW

The Georgia Court of Appeals' opinion is reported officially at 166 Ga. App. 93 and unofficially at 303 S.E.2d 292 (March 11, 1983).

VI.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. The date of the reported opinion sought to be reviewed is March 11, 1983. Appendix at A-1 to A-9.

B. Petitioner filed within the mandated ten-day period (Ga. Code Ann. § 24-3648(b)) on March 21, 1983, a motion for rehearing which the Georgia Court of Appeals denied by order of

March 30, 1983 (Appendix at A-10); whereupon petitioner filed on April 11, 1983 in the Court of Appeals within the mandated ten-day period (Ga. Code Ann. § 24-4531), excluding Saturday and Sunday, April 9, 10, 1983 (Ga. Code Ann. § 24-3603), a notice of intention to file a writ of certiorari in the Georgia Supreme Court, filed a petition for said writ within the mandated twenty-day period (Ga. Code Ann. § 24-4531) on April 19, 1983, and the Georgia Supreme Court denied a writ of certiorari by order entered June 7, 1983. (Appendix at A-53).

Where the highest state court has jurisdiction to review a decision of a lower state court (and the Georgia Supreme Court has such power under the 1976 Georgia Constitution then in effect, Article VI, Section II,

Paragraph IV; Ga. Code Ann. § 2-3104), but refuses to do so, the time to file the petition for writ of certiorari in the Supreme Court of the United States runs from the date of the refusal to review. American Railway Express Co. v. Levee, 263 U.S. 19 at 21, 68 L.Ed. 140 at 143, 44 S.Ct. 11 (1923, per Holmes, J.).

C. The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1257(3) (1970).

VII.

CONSTITUTIONAL PROVISIONS, STATUTES WHICH THE CASE INVOLVES

Tenant demonstrates that portion of a Georgia statute, 1 Ga. Laws 1970, pp. 968-972, specificially, Ga. Code

Ann. § 61-304(c) (now OCGA §§ 44 - 7 - 54(b)) is unconstitutional on its face. The entire Georgia dispossessory statute is set forth as it existed at all times in this litigation at A-55 to A-66.

Tenant also argues that said Ga. Code Ann. § 61-304(c) was unconstitutionally applied in this case.

The constitutional provision under which said Georgia statute is unconstitutional is the Fourteenth Amendment, Section 1, to the United States Constitution, which states in part

> "[N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The rest of said constitutional provision is in the Appendix at A-54.

VIII.

STATEMENT OF THE CASE

A. The Transaction

Tenant's parent wanted to open an Atlanta office December 1, 1981, to offer private office services to small users, but declined to enter a 20-year lease. Rather, parent organized a wholly-owned subsidiary, tenant; and despite landlord's desires, landlord agreed to let tenant hold the lease (T-12/31/81 23). Tenant signed landlord's lease on March 11, 1981, which provided that landlord would build 127 individual offices in space designed by tenant below ceiling and by landlord above ceiling (the HVAC - heating, ventilation, air conditioning system). It was a basis of the bargain that tenant would pay no monies until tenant had an opportunity to bring in

subtenants, generate rental income sufficient to pay the base monthly rental, the deferred rental, and the leasehold improvement costs. The lease reflects the parties' schedule that the premises would be completed by June 1, 1981, and rent to start December 1, 1981. Landlord did not begin construction until May, 1981, and the premises were not substantially completed, if at all, until after the writ of possession was executed.

By November 1, 1981, the $11.25 square foot rental on the 25,051 square feet of prime space was below market; rents in the northwest section of the Atlanta, Georgia market were escalating at an exceptional rate which the trial judge recognized. (T-2/5/82 50) Consequently, on November 11, 1981,

landlord gave notice to tenant that it was in default under its lease.

On November 23, 1981, landlord initiated dispossessory proceedings, had tenant served by "nail and mail" on November 30, 1981, which tenant answered on December 7, 1981, with counter affidavit alleging no rent was due, premises were not substantially completed, and no monies were owed to landlord. Tenant filed a demand for jury trial. A rent due hearing was scheduled for December 18, 1981, in the State Court of Cobb County, from the hand of whose deputy clerk the dispossessory warrant and summons had been issued.

B. Rent Due Hearing

At the December 18, 1981 hearing, landlord testified that "[tenant is] in

the business of supplying, providing office services and office space to small users on short-term leases." (T-12/18/81 4) On July 9, 1981, landlord billed tenant $107,018.00 (T-12/18/81 8) for construction work (T-12/18/81 9), but the premises were not complete (T 12/18/81 8) and petition -er did not pay this amount (Ibid).

On September 23, 1981, landlord billed tenant another $99,016.19 for a total of $206,034.19 (T-12/18/81 9) which was not paid (Ibid). On October 27, 1981, parent's president advised landlord that "they [tenant] were having trouble getting their - getting their financing, their funding in place" (T-12/18/81 11). On November 11, 1981, landlord made a demand for $206,034.19 plus $134,335.98, a

proration of the improvement allowance that landlord had obliged itself to put into the space, (T-12/18/81 12) "based on possession of the premises" (T-12/18/81 13), or a total of $340,370.17. This amount was not paid (T-12/18/81 14). Landlord also sought payment of December 1, 1981 base monthly rent of $23,363.63, the deferred rental payment of $1,878.32, or a total of $25,363.63 which landlord's agent explained: "Our agreement was that for a period of six months the lessee would not pay rental to the lessor to give them a period of time in which to start their business up, get the space leased up * * * [emphasis added]" (T-12/18/81 15), "in other words, to get cash flow coming in, before the time comes for him to pay rent" (T-12/18/81 16). This rent was not paid (T-12/18/81 15).

After landlord had rested, tenant's president testified that "Well, one of the more significant defects which was not noticed, I should mention, until after October 29th [1981], is the fact that the sound transmission from office to office is inadequate for our usage of the space. * * * "[P]rivacy is very important to our clients and to our ability to rent the space" (T-12/18/81 22).

"The privacy was nonexistent in that one could hear a conversation very clearly in an adjoining office, in many of the adjoining offices, making it impossible for us to lease those offices as we intended to do, and as that is spelled out in the lease" (T-12/18/81 26).

"[T]he sound was traveling through the open air returns into the vent and down into the next office" (T-12/18/81 26).

Tenant did not require landlord nor even suggest what type of HVAC (heating, ventilation, air conditioning) system should be used in this building. "[Tenant's] specifications covered only the actual floor improvements itself, nothing above the ceiling" (T-12/18/81 26).

On reopening of evidence, landlord admitted, "yes, there is a sound transmission problem, but not because of any -- I mean, that is the way it was designed" (T-12/18/81 36).

Tenant had no subtenants in the space on December 18, 1981 (T-12/18/81

33) and its president did not believe it could obtain any under the present condition of the space. (Ibid) And the space was not of any value to tenant if it could not be leased. (T-12/18/81 34)

> THE COURT: * * * "I find the evidence evenly balanced on the question of substantial completion, and I will resolve that against the party [landlord] with the burden of proof and find in favor of the Defendant [tenant] on that" [T-12/18/81 45].

But the trial court ruled that tenant had to pay $340,370.17 into the registry of court in three days. Tenant's counsel asked for a bond (T-12/18/81 50-51), to which the judge replied:

> "THE COURT: * * * I think if the parties [tenant] are going to be irreparably harmed by the Court's order . . . then the parties need to come to the bargaining table and get this case settled, which ought to have been done to begin with" [T-12/18/81 51].

"THE COURT: That [$340,370.17] is to be paid into the court by 5:00 p.m. Monday [December 21, 1981] in cash [T-12/18/81 53]. "[A] check won't do, either. It is going to have to be in cash or some sort of certified money to be in compliance with the order" [Ibid].

C. Assignment of Lease to Parent and Notification to Court and Landlord

As established at a hearing prior to the issuance of the Writ of Possession on December 31, 1981, tenant was indigent, it had "very little" assets (T-12/31/81 31, 38), "it is not a going concern at the moment [December 31, 1981]" (Ibid). "It has a small bank account here in Atlanta" (Ibid). "The amount in that bank account is very small, under $100. It may have had $200. It does not at this point have any other assets to my knowledge," (Ibid). "The bank account did not have over $300 in it at any one time" (T-12/31/81 44).

The Court directed questions to the tenant regarding its assets (beginning at T-44 to 46) to which the responses were: "[tenant] was a leasehold corporation Your Honor." It did not hold any other leases, cash, deposits [other than $200 balance in checking account], receivables, anything of any value. (T-12/31/81 46).

In desperation, but also because of a lease provision and parent's financial superiority, tenant attempted to assign the lease to parent on December 19, 1981. The testimony as to the respective net worths of tenant and parent were adduced to show that parent's net worrh was greater than tenant's. Court found this as fact (T-12/31/81 54).

After the December 19, 1981 assignment, tenant moved the court for a rehearing in a letter of December 21, 1981, hand-delivered to the judge and landlord before the order of that date was entered. The Court read the letter (R-229, 231). The Court refused a rehearing. (T-12/31/81 61)

D. Writ of Possession

After a hearing on December 31, 1981 at which tenant's indigency was conclusively established, Court entered writ of possession.

Parent attempted unsuccessfully in another court with equitable jurisdiction (cf. T-1/5/81 12), to enjoin enforcement of writ but was unsuccessful on January 7, 1982 [T-2/5/82 13), when writ was enforced and landlord was put in possession.

E. Execution of Writ of Possession and Motion Stage

On January 25, 1982, tenant filed motion to amend and supplement answer, adding counterclaims (T-2/5/82 6); and obtained rule nisi order from the clerk of court establishing a pretrial hearing on March 10, 1982 (R-36).

Landlord then sought to amend and supplement the dispossessory warrant and to add parent as additional party defendant (R-83). Landlord also moved for expedited discovery and special trial setting (R-157). At landlord's request on January 28, 1982, less than 30 days from the December 31, 1981 writ of possession, the trial Court moved up hearing to February 5, 1982 (R-139).

At the hearing on February 5, 1982, the trial court held that tenant's answer and landlord's dispossessory warrant were amended in propio vigore.

The court also noted for the record that parent's counsel was present, and the Court said: "They have notice and opportunity to be heard on the point, even though they are not a party." (T-2/5/82 58)

A reason for Court's alerting to the issue of Fourteenth Amendment Due Process of Law was because of actions by parent in Superior Cout of Cobb County after tenant's assignment of lease. Court was cognizant of tenant's argument that assignment had relieved it of obligations under lease, as clearly provided in Paragraph 65 of the lease, and dispossessory proceedings were mooted.

In respect of all these contentions, the trial court found as fact and conclusion of law:

> I think the classic provisions of the due process clause have been complied with. . . (T-2/5/82 63)

Again the Court observed:

> I believe this case is one where things need to be handled not in a piecemeal fashion, but as expeditiously as possible, of course, having due regard for everybody's opportunity to be heard. (T-2/5/82 63, 64)

The Court granted Defendant's motion to add omitted counterclaims in the interest of justice (T-2/5/82 23) because they either did not become ripe until after the writ of possession was entered (albeit temporary, thought tenant) or they were omitted in interest of finding grounds of settlement with landlord. The Court also took a number of motions under advisement (T-2/5/82 45). In a permitted brief to the Court, tenant's counsel said:

> "The Court granted a provisional writ of possession on December 31, 1981 because of defendant's inability to pay $340,370.17 into the registry of the Court. * * * Removing the issue of right to possession from the jury based soley upon defendant's financial condition violates the Georgia Constitution." Letter to Honorable Thomas E. Cauthorn, III dated February 8, 1982 (R-215).

F. Unforeseeable Order Pretermitting Jury Trial or Further Proceedings

Tenant was blindsided by February 11 Order. Tenant could not ask the court for reconsideration, as it had already been cautioned not to quibble with the court:

> "THE COURT: Counsel, I know you have made a forceful argument on behalf of your client. The court has ruled. I am sure you are not quibbling with the Court. That is the end of the proceedings". (T-12/18/81 54)

The Court later warned of holding Tenant's director in civil and/or criminal contempt if it continued to possess the premises after the writ

of possession should be executed (T-12/31/81 75,76). The trial court brought the subject up again on February 5, 1982: T-2/5/82 36, 37.

G. Appeal to Georgia Supreme Court

Within the mandated 30 day appeal period, tenant appealed to the Supreme Court of Georgia (R-1) enumerating error as follows:

> "I. The State Court of Cobb County erred in terminating the dispossessory proceeding by order of February 11, 1982:
>
> (a) The order of February 11, 1982 deprived [tenant] of Due Process of Law under ... the Fourteenth Amendment to the 1789 Constitution of the United States of America.* * *
>
> (b) The order of February 11, 1982 denied [tenant] of Equal Protection of the Laws under ... the Fourteenth Amendment to the United States Constitution."
>
> "II. The State Court erred in entering the Writ of Possession on December 31, 1981...."

"III. The State Court erred in entering the Order of December 21, 1981, commanding [tenant] to pay $340,370.17 into the registry of the court."

Tenant's brief filed in the Georgia Supreme Court on July 21, 1982 argued Fourteenth Amendment deprivation of property without Due Process of Law at pages 2-3, 4, 7, 14-15, 24; and tenant's supplemental brief filed August 3, 1982 argued Due Process of Law issue at pp. 15-17 ("Another issue alluded in [tenant's] brief is whether the entire proceedings in the State Court was lacking in fundamental fairness. This is a due process argument." pp. 16-17), and 21.

H. Transfer to Court of Appeals and Decision

Oral argument was scheduled for September 10, 1982. Three days before, tenant's counsel received verbal notice

of a Supreme Court order transferring same to Court of Appeals. The Court of Appeals' majority opinion commented:

> "[Tenant] took an appeal from that [Cobb State Court February 11, 1982] order to the [Georgia] Supreme Court, raising several questions concerning the constitutionality of Code Ann. § 61-304 (OCGA § 44-7-54) and its application in this case. The Supreme Court transferred the case to this court without opinion."

The Court of Appeals' opinion implicitly rejects any constitutional law challenge to the application of the dispossessory statute.

While the Georgia Supreme Court alone has authority to determine the facial constitutionality of a Georgia statute, Ga. Code Ann. § 2-3104, the Georgia Court of Appeals has the constitutional authority to determine whether a facially constitutional statute is unconstitutionally applied.

Western Union Tel. Co. v. King 188 Ga. 95, 2 S.E.2d 909 (1939) (where Western Union's demurrer [motion to dismiss] to a petition [complaint] was acknowledged to raise a constitutional issue but the Supreme Court transferred the case to the Court of Appeals) with Western Union Tel. Co. v. King 61 Ga. App. 537, 6 S.E.2d 368 (1939) (where, upon consideration by the Georgia Court of Appeals of said case after transfer, the Court reversed a jury verdict for petitioner [plaintiff] because defendant's motion to dismiss should have been granted for the constitutional reason given).

I. Petition for Writ of Certiorari to Georgia Supreme Court

Based on the Court of Appeal's five to four split decision affirming the trial court's termination of the

dispossessory proceedings and the impact on the several million tenants throughout the State of Georgia, tenant sought a petition for writ of certiorari in the Georgia Supreme Court. Fourteenth Ammendment Due Process and Equal Protection arguments were again raised and discussed. But the court denied a writ of certiorari after two months of deliberations, June 7, 1983, with one Justice dissenting.

IX.

STATE COURT DEPRIVED TENANT OF DUE PROCESS OF LAW

A. Georgia's Current Dispossessory Statute

The Georgia dispossessory statute may be utilized where (Ga. Code Ann. § 61-301) a tenant "shall fail to pay the rent when the same shall become due. [emphasis added.]" "[T]he rent" is not defined. The statue may be utilized against a tenant for "hold[ing] possession of the land or tenements over and beyond the term for which the same were rented or leased to him" (Ibid), which is in fact what the landlord asserted in a December 18, 1981 amendment to the dispossessory warrant, but the lease was never validly terminated, unless by operation of law when the writ of possession was executed, January 7, 1982. Section

61-301 permits the owner of the tenements by attorney at law to demand possession of the premises so rented, which was done by letter of November 11, 1981 (Plaintiff's Exhibit No. 5, December 18, 1981), and if the tenant shall not deliver possession when demanded, the owner's attorney may make an oath before a judge of the superior court or a justice of the peace. The dispossessory warrant was sworn before a deputy clerk of the State Court of Cobb County without seal or other proof that she held such position. The oath required is "to the facts". There is no requirement of specificity. A printed form of dispossessory warrant and summons of uncertain origin were used at bar.

Section 61-302 permits the justice of the peace before whom the affidavit

is made to issue a summons to any lawful constable of the county where the land lies to be served with the affidavit. If "after reasonable effort if no such person is found residing on the premises, by tacking a copy ... on the door of the premises and on the same day ... mailing by first class mail a copy ... to the defendant at his last known address. ..." Service was not contested below. "The summons ... shall command ... the tenant to answer either orally or in writing within seven days from the date of actual service..." The trial court ruled February 11, 1982 that a portion of the summons which warned that rent would be made judgment of court if default occurred was strickened as void (A-43). "The answer may contain any legal or equitable defense or counterclaim." Tenant's answer

contested that "the rent" was due, that the premises were substantially completed.

Section 61-303: * * * "If the tenant answers [Tenant insisted that it had a right to trial] a trial of the issues shall be had. ..." "Every effort shall be made by the trial court to expedite a trial of the issues. The defendant shall be allowed to remain in possession of the premises pending the final outcome of the litigation: Provided, however, that the tenant at the time of his answer pays rent into the registry of the court pursuant to Section 61-304 [emphasis added]." The trial court found that no rent was due, past, present or future (T-12/18/81 45,46). Tenant contended that the court's construction of the lease (that construction costs were due prior to the

premises being substantially completed or the defects eliminated) was clearly erroneous. Tenant showed its indigency, but proceeded under the then current State of Georgia law that execution of a writ of possession was not a final judgment, but merely a provisional remedy for the landlord's protection. Johnson v. Gwinnett County Bank, 156 Ga. App. 597, 275 S.E.2d 157 (1980).

The provisions of Section 61-304 are conditioned on: "In any case where the issue of the right of possession cannot be finally determined within one month from the date of the original affidavit, the tenant shall be required to pay into the registry of the trial court:" The marshal wasted a week in serving the dispossessory summons and conclusory affidavit, a matter in landlord's control (he could have hired

an off-duty marshal to make the service instanter). Tenant sought no delay, answered promptly within the seven-day period allowed for an answer (R-6), a detailed counter-affidavit and a demand for jury trial (R-15).

The section then lists those items which "the tenant shall be required to pay into the registry of the trial court":

"(a) All rent which becomes due after the issuance of the dispossessory warrant as said rent becomes due." The trial court stated to tenant's counsel from the bench on December 18, 1981: "I find in your favor on the rentals." (T-12/18/81 46) Thus tenant was not required to pay the "Base Rental" of $23,485.31 first due on December 1, 1981 nor the "Deferred Monthly Rental" of

$1,878.32 due on December 1, 1981, a total of $25,363.63 (see Special Stipulation No. 90 to the lease), which total sum landlord sought in December 18, 1981 amendment to dispossessory warrant. (R-17)

"(b) All rent allegedly owed prior to the issuance of the dispossessory warrant. ..." Again, the trial court held: "I find in [tenant's] favor on the rentals." (T-12/18/81 46) But the court misconstrued the lease and held that $340,370.17 of leasehold construction costs including the landlord's share thereof were to be deemed rent and transferred to the tenant.

Subsection (c) of Section 61-304 provides that as follows:

"(c) If the tenant should fail [for any reason whatever] to make any rental payment as it becomes due pursuant to subsections (a) or (b) of this section, the court shall [mandatory; no discretion (which construction landlord urged (T-12/31/81 70))] issue a writ of possession and the landlord shall be placed in full possession [permanently, indefeasibly, (rather than provisionally) as interpreted by the trial court and the appellate courts] of the premises by the sheriff, deputy or constable [despite the joining of issue by filing an answer, demanding jury trial, and the statute providing jury trial]."

This section provides no excuses for an indigent tenant, such as Acts of God, bankruptcy or indigency. The section provides no safeguard for error by the trial judge unless the tenant is wealthy.

More seriously, the section does not require the trial judge to find that the landlord will probably win at the future trial. The court is deprived of discretion: it must issue the writ.

This mandatory feature makes certain applications of the statute, as in the instant case, a violation of Fourteenth Amendment Due Process, even where the statute is not interpreted as an indefeasible, permanent dispossession.

Subsection (d) provides that any "part of the fund [paid by tenant into the registry of the trial court] which is a matter of controversy in the litigation shall remain in the registry of the court until a final determination of the issues." Should tenant have been rich rather than poor and had had $340,370.17 cash to pay into the registry of the court, then since tenant had contested that any of the misused $340,370.17 had benefited it in its proposed business of private office services, none of these funds would have been paid out of the registry to the

landlord. The landlord would have received no benefit unless it prevailed at trial on the merits. And the outcome of trial was very much in doubt as evidenced by the trial judge's statement that the evidence on substantial completion was evenly balanced between landlord and tenant. Leasehold improvements designed and paid for by landlord were substandard, common law principles would enable tenant to avoid reimbursing landlord for the full amount of same until the improvements were substantially completed.

Section 61-305 (a) reads:

> "(a) If, on trial of the case, judgment is against the tenant, judgment shall be entered against the tenant for all rents due and for any other claim relating to the dispute [emphasis added]."

This section belies a statement that Georgia's current dispossessory

statute is primarily concerned with possession: In fact, it is primarily concerned with a money judgment for past due rent. Whether tenant has possession or not of the premises would seem to be irrelevant to rent collection. While it may be true that the unwritten intention of the General Assembly was to enable landlords to collect a money judgment, it is not reasonable to bar a tenant from litigating the amount of money due for rent by his mere inability to pay the very rent he claims is not due, especially where the trial court did not indicate that landlord would possibly prevail on the merits.

Subsection (b) of Section 61-305:

> "(b) If judgment is for the tenant, he shall be entitled to remain in the premises and the landlord shall be liable for all foreseeable damages shown to have

been caused by his wrongful conduct. Any funds remaining in the registry of the court shall be distributed to the parties in accordance with the judgment of the court."

The subsection supports a construction that a writ of possession is a final judgment. Here the winning tenant is entitlted "to remain in the premises". The statute does not state that a tenant is entitled to retake premises from landlord after losing them from failure to pay rent into the registry of court.

The location in this subsection (b) of a provision for distributing funds in the registry of the court suggests a legislative intention to secure the tenant in retrieving his rent payments from the court to which they were inequitably paid, clearly a post hoc determination.

Section 61-306 concerns appeal and requires that if the tenant loses, he may appeal provided he continues to make rent payments into the court registry. The section does not deal with the case where the tenant wins and the landlord appeals. Since the appellate court could reverse in favor of the landlord, and since the tenant is still in possession of the premises, the trial court could probably continue to require the tenant to pay the sums into court.

B. Georgia's Pre-1970 Dispossessory Statute */

Two features of pre-1970 law caught the attention of this Court in Sanks v. Georgia, 401 U.S. 144, 27 L.E.2d 741, 91 S.Ct. 593 (1971):

(1) that the tenant was required to post a bond, with good security, for

*/ Georgia's dispossessory statute dates to 1811. Hicks v. Beachan, 131 Ga. 89 at 91, 62 X.E. 45 (1908)

double (by reading former § 61-304 [on whether rent was due] in pari materia with former § 61-305 [permitting a double rent recovery if landlord should prevail on appeal]), the amount of rent allegedly owed the landlord in order to litigate the issue whether rent was due;

(2) upon losing the litigation, the tenant would owe double rent damages to the landlord. Former § 61-305.

There is now no double rent bond provision in the current Georgia dispossessory statute. But the interpretation of § 61-304 to include, as rent, leasehold construction costs in an amount to fourteen (14) times the amount of the base and deferred monthly rent is a reincarnation of the double (or here, quatturodecim) rent bond.

A trial on the merits is a fascade under these circumstances.

C. Oregon's Forcible Entry and Wrongful Detainer (FED) Statute Reviewed in Lindsey v. Normet, 405 U.S. 56 (1972)

Considering the inherent difference between a forcible entry statute and a dispossessory statute, three aspects of Oregon's FED were at issue in Lindsey v. Normet, 405 U.S. 56, 31 L.E.2d 36, 92 S.Ct. 862 (1972):

(1) the requirement of security for accruing rent if a continuance in the trial is sought (held, not unconstitutional);

(2) the limitation on triable issues to tenant's default and not to landlord's breach of duty to maintain the premises or any warranty of

habitability (held, not unconstitutional);

(3) the requirement of posting a bond on appeal in twice the amount of the rent expected to accrue pending appellate decision which shall be paid to landlord if he wins regardless of actual damages (held, unconstitutional).

The Court said regarding point (1):

> "A requirement that the tenant pay or provide for the payment of rental during the continuance of the action is hardly irrational or oppressive. It is customary to pay rent in advance, and the simplicity of the issues in the typical FED action will usually not require extended trial preparation and litigation, thus making the posting of a large security deposit unnecessary. Of course, it is possible for this provision to be applied so as to deprive a tenant of a proper hearing in specific situtations ..." 17 L.E.2d 45-46.

The Court noted:

"Before a tenant is forcibly evicted from property the Oregon statute requires a judicial determination that he is not legally entitled to possession."

By contrast, a Georgia court is not required even to rule that the landlord possibly will win.

On point (3) the Court observed:

"It cannot be denied that the double-bond requirement heavily burdens the statutory right of an FED defendant to appeal. While a State may properly take steps to insure that an appellant post adequate security before an appeal [a] to preserve the property at issue, [b] to guard a damage award already made, or [c] to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord." 17 L.E.2d 53.

D. Judicial Interpretation of Georgia's Current Dispossessory Statute Has Reverted to Pre-1970 Construction

In 1966 Georgia Supreme Court held

that execution of the writ of possession for failure to post the double rent bond mooted Fourteenth Amendment challenges to the pre-1970 Georgia dispossessory statute. Williams v. Shaffer, 385 U.S. 1037, 17 L.E.2d 683, 87 S.Ct. 772 (1967). The Supreme Court of the United States denied certiorari with three justices dissenting. Justice Douglas' dissenting opinion noted that mootness was a federal question and a state's court view was not binding on the Court. 17 L.E.2d 683.

In 1975 the Georgia Supreme Court reversed the Georgia Court of Appeals and held that under the post 1970 law a tenant's answer can be filed without the payment of rent or bond. Mountain Hardwoods & Pine, Inc. v. Coosa River Sawmill Co., 233 Ga. 414, 211 S.E.2d 712 (1975). The Court concluded:

"The fact that such payment was not made does not render defective the answer and counterclaim so that no issue remains to be tried, leaving the affidavit 'unopposed' so as to entitle the plaintiff to an unqualified warrant."

Tenant argued that this case prevented a writ of possession from being a final judgment and made it a provisional remedy until trial.

In 1979 the Georgia Supreme Court in Mitchell v. Excelsior Sales & Imports, Inc., 243 Ga. 813, 256 S.E.2d 785 (1979), superficially indicated that failure to pay into Court rent caused "any issue as to appellant's right to possession of the premises [to have] become moot." p. 816

Tenant's retort was that granting of the motion for summary judgment prior to the order to pay rent demonstrated there was no genuine issue of material

fact and the trial court was right. (Tenant pointed out this case to the Georgia courts.)

Notwithstanding the statute or these cases, the Georgia Court of Appeals clearly had held prior to the dispute at bar, that a writ of possession even if executed was not a final judgment:

For example, in Johnson v. Gwinnett County Bank, 156 Ga. App. 597, 275 S.E.2d 157 (1980) the Georgia Court of Appeals stated:

> "The procedure in Code § 61-304 should be followed and only if the tenant fails to comply may possession be granted to the landlord and then only pending final judgment." [emphasis added at 598]

Accord: Grantham v. Nelson, 160 Ga. App. 68, 286 S.E.2d 59 (1981).

"Held: Under the above circumstances, the writ of possession does not constitute a final judgment:

* * * We must reject the appellants' contention that the writ of possession purported to dismiss their answer and counterclaim." at 68.

Accord: Jelks v. World of Realty, Inc., 153 Ga. App. 720, 266 S.E.2d 357 (1980) at 722.

"If failure to make the rent payment [into the registry of the court] does not render the answer defective or dispel the issues, even less so should such failure result in judgment against the defendant and deprive her of her "unqualified right" (Mountain Hardwoods supra) to litigate the obligation [to pay rent to the landlord]." at 723

This March 5, 1980 decision by Judge Birdsong was followed by his decision in Leverette v. Moran, 153 Ga. App. 825, 266 S.E.2d 574 (1980) on March 11, 1980, just six days later. The Court seemed to hold that execution of a writ of possession was a final judgment

where the landlord had not previously demanded rent. The space for the past due rent to be written onto the dispossessory warrant was blank.

Tenant had no trouble distinguishing Leverette because the tenant admitted rent was due. Since the landlord asked for no rent, and Leverette vacated the premises voluntarily, the writ was final. The decision was favorable to Leverette as he was the judgment debtor on a post-writ judgment.

E. Decision Below

In entering the majority opinion below, the Georgia Court of Appeals reverted to pre-1970 law because the answer was effectively strickened and jury trial denied when the writ of

possession was executed. Landlord's position is not strengthened by the fact that there was a hearing on the issue of non-payment of the $340,370.17 into court. The fact is, the answer was strickened.

F. Deprivation of Fourteenth Due Process of Law

The Fourteenth Amendment was violated because meritorious defenses were strickened without any meaningful hearing on the merits. Remember that the trial court had not even found a possibility that landlord would prevail at trial but, rather, the findings were interloctory. Remember, also no conterclaims had been asserted by tenant at that point. The striking of defenses is unconstitutional in three respects:

(1) It is a penalty, a forfeiture of an estate, a taking of a legal right,

a transfer of tenant's interest to the landlord; it is an incapacity to litigate in the trial court. Cf. Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897); Windsor v. McVeigh, 93, U.S. 274, 277, 23 L.Ed. 914, 915 (1876); Hurtado v. California, 110 U.S. 516, 28 L.Ed. 232 (1884).

(2) It is fundamentally unfair to an indigent tenant who is deprived of property without an opportunity to show the court that it tried bona fide to raise the money but could not because of indigency. Bearden v. Georgia, -U.S.-, 76 L.E.2d 221, 103 S.Ct. 2064 (1983); Cf. Boddie v. Connecticut, 401 U.S. 371, 28 L.E.2d 113, 91 S.Ct. 780 (1971).

(3) It is contrary to common law notions of the proper role of landlord tenant law in this country. Lindsey v.

Normet, 405 U.S. 56, 31 L.E.2d 36, 92 S.Ct. 862 (1972).

(4) It deprives tenant of an adequate and meaningful opportunity to be heard on the merits because the barrier to a trial on the merits is so formidable. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 42 L.E. 2d 751, 95 S.Ct. 719 (1975).

Cases supporting tenant's position are Sniadach v. Family Finance Corp. 395 U.S. 337, 23 L.E.2d 349, 89 S.Ct. 1820 (1969) (wage garnishment); Bell v. Burson, 402 U.S. 535, 29 L.E.2d 90, 91 S.Ct. 1586 (1971) (revocation of driver's license); North Georgia Finishing, Inc. v. Di-Chem, Inc., supra (attachment of bank account).

Cases with distinguishable facts - dealing with consumer goods sold on credit are Mitchell v. W.T. Grant Co., 416 U.S. 600, 40 L.E.2d 406, 94 S.Ct. 11895 (1974) and Fuentes v. Shevin, 407 U.S. 67, 32 L.E.2d 556, 92 S.Ct. 1983 (1972).

The Courts of the District of Columbia, California, Florida, Missouri, and West Virginia disagree with the case at bar, but Minnesota's agree: See, Javins v. First National Realty Corp., 138 U.S. App. D.C. 369, 428 F.2d 1071, (D.C. Cir. 19) cert. denied, 400 U.S. 925, 27 L.E.2d 185, 91 S.Ct. 186 (1970); Bell v. Tsintolas Realty Co., 139 U.S. App. D.C. 101,430 F.2d 474 (D.C. Cir. 1970) Green v. Superior Court 10 Cal.3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974, per Tobriner, J., en banc) (tenant had not paid rents in, had quit

premises, but case not moot, at 107 n. 6); Cohen v. Hardman, 416 So.2d 498 (5th D.Ct. App. Fla. 1982); King v. Moorhead, 495 S.W.2d 65 (Mo. Ct. App. 1973); Teller v. McCoy, 253 S.E.2d 114 (W.Va. 1979); but contra Fritz v. Warthen, 298 Minn. 54, 213 N.W.2d 339 (1973).

See generally Restatement (Second) of Property § 10.3 (1977).

X.

STATE COURT DEPRIVED TENANT OF EQUAL PROTECTION OF LAW

A. Two Classes of Tenants: One Rich One Poor; One Can Defend One Can't

As applied by the State Court of Cobb County, Ga. Code Ann. Section 61-304(c) denies Officenters Equal Protection of Law by creating two classes of tenants: A first class which pays an amount into the registry of court determined at an interlocutory hearing on the amount of rent due, which finding is not binding at the subsequent trial, nor is the issue of the right of possession; and a second class of tenant which does not (or cannot, as tenant demonstrated) pay the amount so determined into the registry of court, suffers the nonbinding finding of rent due to be converted post hoc into a conclusive finding (see Section 61-303)

and the issue of right of possession is conclusively determined when the writ of possession is entered and executed.

The second class of tenant (as the one at bar) is damaged by not receiving a trial on the issue of right of possession or any other issue even though it has filed an issuable answer (R-6), demanded timely a jury trial (R-15), and has produced evidence of a genuine issue of fact (R-22). This is an unequal protection of law. It is not justified upon application of the "rational relationship" standard of judicial scrutiny, because the landlord is in no worse position in holding possession pending the outcome of the duspossessory proceeding against the second class tenant, than is the landlord who observes a first class tenant paying "rent" into the registry

of court which the tenant has denied is due and which the landlord will derive no benefit under Section 61-304(d) until the dispossessory proceeding is concluded. See, generally, Linsey v. Normet, 405 U.S. 56, 65-66, 71, 31 L.E.2d 36 92 S.Ct. 862 (1972).

B. Cases

Fourteenth Amendment Equal Protection has been accepted as a basis of decision in a civil case for indigency on one occasion: Smith v. Bennett, 365 U.S. 708, 6 L.Ed.2d 39, 81 S.Ct. 895 (1961) (indigency impermissibly barred filing of writ of habeas corpus). Equal protection was not the basis for decision in Boddie v. Connecticut, 401 U.S. 371, 18 L.E.2d 113, 91 S.Ct. 780 (indigency impermissably barred divorce action) (1971), although concurring opinions

asserted it should have been. Equal protection has rejected in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 93 L.Ed. 1528, 69 S.Ct. 1221 (1949) (shareholder's suit could be barred by failure to post security bond but indigency not in issue). Equal protection has been the basis of opinions in criminal cases: Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956), Burns v. Ohio, 360 U.S. 252, 3 L.E.2d 1209, 79 S.Ct. 1164 (1959), Dowd v. United States, 340 U.S. 206, 95 L.Ed. 215, 71 S.Ct. 262 (1951), Cochran v. Kansas, 316 U.S. 255, 86 L.Ed. 1453, 62 S.Ct. 1068 (1942).

The recent decision of Bearden v. Georgia, -U.S.-, 76 L.E.2d 221, 103 S.Ct. 2064, (1983) discussed the Equal Protection aspects of revoking probation and incarcerating a probationer for inability to pay a fine, but based the

decision on a deprivation of fundamental fairness under Due Process.

XI.
GEORGIA SUPREME COURT PASSED ON CONSTITUTIONAL LAW ISSUES RAISED: HEREIN OF EVOLVING, DISCRETIONARY, CONSTITUTIONAL JURISDICTION IN GEORGIA

A. Self-Imposed Historic Restriction on Jurisdiction

ThE Georgia Supreme Court was not created until 1845, some 112 years after the founding of the colony by General Oglethorpe and some 57 years after the ratification of the Constitution of the United States. This delay has been attributed to public distrust in Georgia of any person trained in law being in a position to upset a verdict of the people, as a jury, or declaring unconstitutional an act of the people's representatives. The Royal Charter forbade lawyers. (Parliament forgot that the Attorney General of the Colony of Georgia was a barrister.) Recognizing this atmosphere, the Georgia Supreme

Court elevated the presumption of constitutionality to an exalted position, and narrowly restricted the class of cases in which it would even attempt a judicial review of the constitutionality of an act of the General Assembly.

The Georgia Supreme Court refused to rule on constitutional issues by erecting a patina of so-called jurisdictional qualifications: For example, the statute attacked had to be identified by reference to the official text and not to the section of the Code of Georgia Annotated, Cooper v. State, 226 Ga. 722 177 S.E.2d (1970); Widemon v. Burson, 224 Ga. 665, 164 S.E.2d (1968); the Constitutional provision at issue had to be referenced in the same way, Krasner v. Rutledge, 204 Ga. 380, 49 S.E.2d 864 (1948); the constitutional

issue had to be formulated correctly, i.e., how and in what manner the statute violates the specified provision f the constitution, Richmond Concrete Products Co. v. Ward, 212 Ga. 773 at 775, 95 S.E.2d 677 (1956); the issue had to be presented to the trial court prior to the allegedly erroneous order or judgment, Alexander v. State, 239 Ga. 810, 239 S.E.2d 18 (1977); the latter had to rule on the issue clearly and distinctly, etc., Ibid.

The Georgia Supreme Court sometimes called these requirements jurisdictional, Gainey v. State, 232 Ga. 334, 206 S.E.2d 474 (1974). Sometimes they were deemed to be merely rules of pleading and procedure, Richmond Concrete Products Co., Inc. v. Ward, supra. The United States Supreme Court respected these standards in determining

whether that court's statutory jurisdiction under 28 U.S.C. §1257 affixed to a case coming from the Georgia Supreme Court, Ferguson v. Georgia, 365 U.S. 570 at 572, 5 L.E.2d 783, 81 S.Ct. 756 (1961); Reece v. Georgia 350 U.S. 85, 88-90, 100 L.Ed. 77, 76 S.Ct. 167 (1965); Williams v. Georgia, 349 U.S. 375, 382-3, 99 L.Ed. 1161 75 S.Ct. 814 (1955); Herndon v. Georgia, 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794 (1935); Stembridge v. Georgia, 343 U.S. 541, at 547, 96 L.Ed. 1130, 72 S.Ct. 834 (1952). Nevertheless, there were exceptions to these hurdles which proved the patina.

The main exception was when an aggrieved party was totally surprised by the action at a trial court and, therefore, could not anticipate the need for a constitutional challenge. An

example of such a case is Wadley Southern Railway Co. v. Faglee, 173 Ga. 814 161 S.E. 847 (1931). In allowing a post jury verdict challenge through an extraordinary motion for a new trial, the Court assumed it had power or jurisdiction to adjudge a constitutional issue even if not timely raised in the trial court. (In the case at bar there had been no trial; court had barred motions for rehearing.)

Interestingly, this exception paralleled the United States Supreme Court's construction of its jurisdictional statute (28 U.S.C. §1257): if the highest state court had no constitutional issue presented to it, but handed down an unanticipated ruling of constitutional dimension, a party could make a constitutional attack by motion for reconsideration and if the highest state court in its discretion refused to adjudge that issue, the

United States Supreme Court's jurisdiction affixed. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 677, 74 L.Ed. 1107, 50 S.Ct. 451 (1930); Herndon v. Georgia, supra

B. Emerging Doctrine of Discretion Where Substantial Constitutional Issue Involved

In recent years the Georgia Supreme Court has critically examined the crust of its constitutional jursidiction and has willingly ignored it in an appropriate case. First, the Court looks to the constitutional grant of power in Article VI, Section II, Paragraph IV of the 1976 Constitution of the State of Georgia, § 2-3104:

> "The Supreme Court . . . shall be a court alone for the trial and correction of errors of law . . . in all cases that involve the construction of the Constitution of the State of Georgia or of the United States . . . in all cases in which the constitutionality of any law of the State of Georgia . . . is drawn in question . . ."

Second, it adjudges whether a substantial constitutional issue is involved. In re Sliz, 246 Ga. 797 at 800, 273 S.E.2d 177 (1980); Barnes v. State, 244 Ga. 302 at 303, 260 S.E.2d 40 (1979); Brown v. Housing Authority of the City of Atlanta, 240 Ga. 647 at 651, 242 S.E.2d 143 (1978). Third, if answered in the affirmative, this Court will adjudge the issue.

In Grantham v. State, 244 Ga. 775, 262 S.E.2d 777 (1979), the party aggrieved by constitutionally infirm judicial action failed to cite to the official statute but only to the Georgia Code Annotated. This Court apparently adjudged the failure to be trivial in comparison to the issue raised, and decided the issue.

In Wiggins v. State, 249 Ga. 302, 303, 290 S.E.2d 427 (1982), the aggrieved party failed to cite either the official statute or the code but the statute was identifiable by any competent lawyer or judge, and the Court in a balancing of interests, allowed the constitutional challenge and ruled on the statute.

More important, the Georgia supreme Court has commenced to adjudge constitutional law issues not presented at all to the trial court. In Barnes v. State, 244 Ga. 302, 303, 260 S.E.2d 40 (1979), the Court wisely pretermitted innumerable habeas corpus challenges by deciding an Equal Protection claim although not raised until appeal. Forestalling future writ of habeas corpus is not materially different from forestalling future writ of certiorari.

In Brown v. Housing Authority of Atlanta, 240 Ga. 647 at 653, 242 S.E.2d 143 (1978), the Court determiend to pass upon the constitutional issue to achieve judicial economy, certain as the court was that in this day of extreme litigiousness someone or many were certain to attack the issue through both the appellate courts. Indeed, it is the difference in the times that this policy is commended: citizens of the older days were not prone to litigation.

That the constitutional law issue might not be of widespread significance before foreshortened constitutional challenge may be had by the Georgia Supreme Court is illustrated by recent bar proceedings against a lawyer. In re Sliz, 246 Ga. 797 at 800, 273 S.E.2d 177 (1980). Its discussion of judicial economy ties in to Brown, but the public

interest is overdrawn. On the other hand, most contitutional issues are of widespread public interest. And the constitutionality of the rent determination provision in statutory dispossessory proceedings affect millions of Georgia and American citizens who are tenants -- both of apartments and office buildings -- as well as those few who are landlords.

In summary the Georgia Supreme Court in recent years has read the constitutional grant of power literally, as it should have been read from the beginning: It has power to review a case on appeal if the judicial act of which a party complains is pursuant to an unconstitutional statute or the judicial act itself offends a Constitutional provision. The Georgia Supreme Court may take jurisdiction if the constitutional issue is an important issue or the public interest is at stake.

XII.

CONCLUSION

"Over a third of our population lives in apartments or other rented housing, [citation to 1970 Census of Housing, Advance Report HC (V.1), p. 11.]." Lindsey v. Normet, 405 U.S. 56, 81, 31 L.E.2d 36, 55, 92 S.Ct. 862 (1972) (Douglas, J., dissenting in part). The 1970 population of the United States was 203,302,031 persons. World Almanac (Newspaper Enterprise Association, 1983 at p. 209.) Over 67,767,344 persons lived in apartments or other rented housing. In 1980, the population of the United States was 226,504,825 persons, more people lived in apartments or other rented housing than in 1970. Over seventy-five million (or 75,501,609 to be exact) persons have an interest in this case.

Some of these seventy-five million persons are poor -- on welfare, relief or other government programs. Each would be directly affected by a writ of certiorari in this case. A ruling for tenant would directly improve the state of mind of each of these persons to some degree.

Respectfully submitted,
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_____
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CERTIFICATE OF SERVICE
AND OF APPLICABILITY OF
28 U.S.C. § 2403(b)

The undersigned, a Member of the Bar of this Court, representing the petitioner herein, does hereby certify that all parties required to be served have been served, and specifically, one copy of the foregoing Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia and of the separately bound Appendix to Petition have been served upon respondent by depositing same in a United States post office, with first class postage prepaid, and properly addressed to counsel for respondent at their last known address:

William N. Withrow, Jr., Esq.
Ralph H. Greil, Esq.
Nancy O. Ewing, Attorney at Law
Troutman, Sanders, Lockerman & Ashmore
127 Peachtree Street, N.E.
Atlanta, Georgia 30043

The undersigned does further certify that 28 U.S.C. § 2403(b) may be applicable and one copy of the foregoing Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia and of the separately bound Appendix to Petition have been served upon the Attorney General of the State of Georgia by depositing same in a United States post office, with first-class postage prepaid, and properly addressed to same at his last known address:

The Honorable Michael J. Bowers
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

This _____ day of _____, 1983

_____
W. Kent Bishop
Counsel for Petitioner
and Member of Bar
Supreme Court of United States